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**(Not) Going Underground: Rectifying a Registered Deeds of Conditions in *PHG Developments Scot Limited (in Liquidation), Petr***

**A. INTRODUCTION**

The remedy of judicial rectification was introduced to Scots law by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the “1985 Act”).<sup>1</sup> It deals *inter alia* with situations where a unilateral legal document fails to express accurately the intention of its grantor. In a recent Outer House case, a developer claimed that a deed of conditions, which it had imposed on an apartment site, was defective in precisely this manner.<sup>2</sup> To complicate matters, the deed had since been registered in the Land Register of Scotland. It was also referred to in fifty-five split-off dispositions, each of which had now been registered in favour of the new proprietors of individual apartments. In his decision, Lord Tyre addressed two points which help to clarify the law in this area: first, the extent to which grantees of unilateral deeds are protected from judicial rectification where the deed in question has already been registered in the Land Register; and, second, the appropriate criteria for determining which of a grantor’s intentions are relevant for the purpose of rectification and which are not.

**B. THE UNDERLYING DISPUTE**

The background to this case is an ongoing dispute between the developers of two apartment sites on the Portobello seafront in Edinburgh: the “Kilns site” and the “Arcade”.<sup>3</sup> The Kilns site was initially owned by The Kiln’s Development Limited (“KDL”) but was subsequently acquired and developed by an associated company, PHG Developments Scot Limited (“the petitioner”). The Arcade was immediately adjacent to the Kilns site. It belonged to Lothian Amusements Limited, the fifty-seventh respondent to the petition (“the respondent”).<sup>4</sup> Both sites were to share an underground car park in the basement of the Kilns site. Missives were therefore concluded between KDL and the respondent. The terms included the sale to the respondent of eighteen identified car parking spaces (the “Arcade spaces”) and the grant of appropriate servitude rights of vehicular and pedestrian access. Pedestrian access was to be granted through a doorway in the eastern wall of the car park. The wall itself was to be located on the boundary between the two sites. In addition, a deed of conditions was to be imposed over the Kilns site but under exception of the Arcade spaces.

Plans changed and the Arcade site did not proceed. The eastern wall of the car park was built entirely on the Kilns site. The deed of conditions which the petitioner imposed on the Kilns site also differed from the envisaged deed in two main respects. First, it provided for the individual apartments owners to have servitude rights of parking and access over the whole car park, including the Arcade spaces. Second, it provided for the eastern wall of the car park to be common property of the apartment owners. The Kilns site was subsequently completed and the fifty-five split-off dispositions were registered. The respondent accordingly resiled from the missives and brought an action for damages against KDL. Following a debate in the Outer House, Lord Doherty decided in favour of the respondent (i.e. the pursuer in that action): firstly, because KDL could no longer grant vacant possession of the Arcade spaces; and, secondly, because KDL could no longer grant pedestrian access through a wall

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<sup>1</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8 ff; Scottish Law Commission, Report on *Rectification of Contractual and other Documents* (Scot Law Com No 79, 1983), paras 1.1 to 2.11.

<sup>2</sup> *PHG Developments Scot Limited (in Liquidation), Petr* [2020] CSOH 58 (hereafter “PHG”).

<sup>3</sup> *PHG* paras 1 to 10.

<sup>4</sup> None of the other fifty-seven respondents entered appearance, *PHG* para 1.

which it no longer owned.<sup>5</sup> In bringing the present action for rectification, the petitioner's stated purpose was to enable it to implement KDL's obligations under the missives. Due to the current Covid-19 pandemic, the debate was conducted by means of written submissions and a telephone conference.<sup>6</sup>

### C. RECTIFICATION OF REGISTERED DEEDS AND THE POSITION OF GRANTEES

Lord Tyre began by addressing the respondent's argument that, since the individual apartment owners had already acquired rights under the deed of conditions (upon registration of their dispositions), the petitioner's application for rectification was incompetent under section 8(3A) of the 1985 Act:<sup>7</sup>

If a document has been registered in the Land Register of Scotland in favour of a person acting in good faith then, unless the person consents to rectification of the document, it is not competent to order its rectification under [section 8(3)].

If, the respondent argued, the petitioner could rectify the deed of conditions without engaging section 8(3A), the apartment owners would effectively be deprived of a protective veto conferred upon them as persons acting in good faith.<sup>8</sup> This could only be avoided if the petitioner were required to also seek rectification of the individual split-off dispositions under section 8(3) of the Act. That provision empowers the court to rectify "any other document ... which is defectively expressed by reason of the defect in the original document". The appropriate consequential rectifications would be to insert references to the deed of conditions as rectified.

In response, Lord Tyre noted the distinction drawn by the 1985 Act between rectification under section 8(1)(a) and rectification under section 8(1)(b): the former is for deeds intended to express or give effect to an agreement; the latter is for deeds which are (i) intended to create, transfer, vary or renounce a right and (ii) unilateral in substance as well as form.<sup>9</sup> Most conveyancing deeds (e.g. dispositions) are unilateral in form. Nevertheless, they often give effect to a preceding agreement (e.g. missives).<sup>10</sup> By contrast, the Kilns site deed was unilateral in substance as well as form, since the petitioner was never a party to the missives concluded between KDL and the respondent. This was significant since rectification under s8(1)(b) depends on whether a document accurately expresses the *subjective* intention of its granter.<sup>11</sup> By its very nature, an application under section 8(1)(b) will often deprive a grantee of a benefit conferred on it in a deed which its grantor now claims is defective.<sup>12</sup> This can be contrasted with the position of a third party acting in good faith – for example, a heritable creditor to whom the grantee has granted a standard security.<sup>13</sup> Subsections 8(3) and 8(3A) exist to protect such third parties from consequential rectification of documents *other than the original document* that have been registered in their favour in the Land Register. By contrast, Lord Tyre noted, the owners of the individual apartments were not third parties at all. Rather, they were "grantees

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<sup>5</sup> *Lothian Amusements Limited v The Kiln's Development Limited* [2019] CSOH 51. For commentary on the property law aspects, see KGC Reid & GL Gretton, *Conveyancing 2019* (2020) 12-13.

<sup>6</sup> PHG para 2.

<sup>7</sup> For the respondent's argument, see PHG paras 18 to #20.

<sup>8</sup> PHG para 19.

<sup>9</sup> PHG para 28, citing the discussion in GL Gretton & KGC Reid, *Conveyancing* (5<sup>th</sup> edn, 2018) para 21-05.

<sup>10</sup> E.g. the deed of conditions in *Sheltered Housing Management Ltd v Cairns* 2003 SLT 578.

<sup>11</sup> PHG para 29.

<sup>12</sup> PHG para 30.

<sup>13</sup> PHG para 32, citing Scottish Law Commission, *Report on Land Registration* (Scot Law Com no 222, 2010), para 29-26.

who, by virtue of the combined effect of the Deed of Conditions and the dispositions in their favour, have obtained rights which [the petitioner] now asserts that it was not its intention to grant to them".<sup>14</sup> Section 8(3A) was therefore irrelevant, since the apartment owners were precisely the sort of party whom one would expect to suffer prejudice in the event of a successful application under section 8(1)(b). Lord Tyre particularly emphasised the point that the 1985 Act does not provide grantees with an automatic veto – rather, grantees are protected by two other important safeguards: (a) the right to enter the court process and oppose the application; and (b) the court's discretion to refuse to grant the order for rectification.<sup>15</sup> As it happens, none of the apartment owners entered appearance.<sup>16</sup> Lord Tyre did, however, remark that, had the apartment owners' consent actually been required under section 8(3A), their failure to enter appearance would not in itself provide evidence of consent.<sup>17</sup>

Helpfully, Lord Tyre then went on to explain why, given the retrospective nature of judicial rectification, it would in any event be unnecessary for the petitioner to also seek rectification of the split-off dispositions. As far as a deed's terms are concerned, rectification is retrospective.<sup>18</sup> If an order for rectification were granted, the deed of conditions would be deemed always to have been in its rectified form. Accordingly, any references in the split-off dispositions would also be deemed to have always referred to the rectified deed of conditions – no consequential amendments required.<sup>19</sup> Lord Tyre distinguished this from an order for rectification's effect with regard to real rights already acquired under the deed of conditions. Under section 8A of the 1985 Act,<sup>20</sup> any order for rectification of a document registered in the Land Register has only *prospective* real effect from the moment the order is registered. In other words, even if the deed of conditions were deemed never to have granted the rights of servitude and common ownership, the apartment owners would nevertheless *lose* those rights upon registration of the order rather than be considered never to have acquired them in the first place. This distinction is conceptually important, since it tidies up the previously messy relationship which existed between land registration principles, which aim for accuracy and reliability, and a remedy which historically had the effect of rendering the Land Register retrospectively inaccurate simply by virtue of an unregistered order.<sup>21</sup> A situation where use of the Arcade spaces on day one would have been lawful on day two but would then be retrospectively reclassified as trespass or encroachment on day three should be avoided in a rational system of property law.

#### **D. WHICH INTENTIONS ARE RELEVANT FOR RECTIFICATION?**

Lord Tyre next considered whether the petitioner had pled a relevant case for rectification. The petitioner, he noted, had averred four separate intentions which the deed of conditions had failed to express accurately: first, that the apartment owners would have no rights over the Arcade spaces;

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<sup>14</sup> PHG para 32.

<sup>15</sup> PHG para 31.

<sup>16</sup> A possible explanation may lie in the petitioner's averments that each apartment owner had been allocated a specified parking space and that the Arcade spaces had, in any event, been obstructed by bollards, PHG para 27

<sup>17</sup> PHG para 34.

<sup>18</sup> PHG para 33.

<sup>19</sup> PHG para 33.

<sup>20</sup> As introduced by Land Registration etc (Scotland) Act 2012, s 55(3).

<sup>21</sup> See Gretton & Reid (n 9) paras 21-11 to 21-12; Scottish Law Commission *Report on Land Registration* (n 13) paras 29.19 to 29.23 and 29.30. Orders for rectification still have retrospective real effect with respect to deeds registered in the General Register of Sasines.

second, that the doorway in the car park wall would not be common property; third, that the deed of conditions would not prevent the implementation of KDL's obligations under the missives; and, fourth, that it would still be possible to convey the Arcade spaces to the respondent with vacant possession and to grant pedestrian access through the doorway.<sup>22</sup> On balance, Lord Tyre was satisfied that a relevant case had been pled.<sup>23</sup> In reaching this conclusion, however, he provided a useful reminder of two guides for deciding which of a grantor's intentions are relevant for the purposes of rectification and which are not.

The first of these guides is found in Lord Macfadyen's decision in *Bank of Ireland v Bass Brewers*.<sup>24</sup> This is that section 8(1)(b) directs the court to first consider what the grantor intended by way of creation, transfer, variation or renunciation of rights. In this regard, the substance of what the grantor intended to achieve is as important as the form of document by which the grantor intended to achieve it. Once the substance of the grantor's intention has been identified, the court must then determine whether the document fails to accurately express it, even if the words used were precisely those which the grantor intended to use. To do otherwise would be to reduce rectification to little more than a remedy for correcting clerical errors. The second guide is Lord Turnbull's warning in *Nickson v HMRC* that a distinction must be drawn between a failure to achieve the legal result intended by the execution of a document and a failure to achieve some associated or consequential purpose beyond that to be effected by that document, the latter not being sufficient for the purposes of rectification.<sup>25</sup> In the present case, Lord Tyre was satisfied that the first and second of the petitioner's averred intentions were properly concerned with identifying the substance of the petitioner's intention by way of the creation of rights. By contrast, the third and fourth averred intentions were insufficient in themselves, as they focused on wider results beyond the immediate results intended to be achieved by the execution of the deed of conditions.<sup>26</sup> By relying on these two guides, Lord Tyre therefore adopted an appropriately nuanced approach, one which avoids formalism while still focusing attention on establishing the grantor's immediate intention when granting the document in question. Interestingly, Lord Tyre did go on to note that the third and fourth intentions, although insufficient in themselves to ground rectification, did nevertheless provide a factual explanation of *why* the first and second intentions were not accurately expressed in the eventual deed of conditions.<sup>27</sup> As a result, they were not to be excluded from probation. Again, this seems sensible and appropriate.

## E. CONCLUSION

It is, of course, too early to say whether the petitioner will be successful in obtaining an order for rectification. Even if the case does proceed to a proof before answer – and the Court Rolls suggest a reclaiming motion will take place before that<sup>28</sup> – the petitioner is not home and dry. It is one thing to use wording which has been deliberately (though incorrectly) chosen to achieve a specific legal result, as was the case in *Bank of Ireland*. It is another thing altogether to use wording which appears not to disclose any attempt to exclude the Arcade spaces, as in the present case.<sup>29</sup> On this point, Lord Tyre's

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<sup>22</sup> PHG para 36.

<sup>23</sup> PHG para 35.

<sup>24</sup> 2000 GWD 20-786; see also KGC Reid & GL Gretton, *Conveyancing 2000* (2001) 118-119.

<sup>25</sup> *Nickson v HMRC* 2017 SC 50.

<sup>26</sup> PHG para 36.

<sup>27</sup> PHG para 38.

<sup>28</sup> The Court Rolls for Tuesday 13<sup>th</sup> October show that a procedural hearing for P897/19 (Reclaiming motion of Lord Tyre) was to take place before an Extra Division of the Inner House.

<sup>29</sup> A point anticipated in Reid & Gretton, *Conveyancing 2000* (n 24) at 119.

remarks on the evidential value of the petitioner's averred third and fourth intentions will have encouraged the petitioner, though the respondent will no doubt seize upon Lord Tyre's comment shortly after that any carelessness on the part of the petitioner could be relevant when exercising the court's discretion under section 8(1)(b).<sup>30</sup> In any event, regardless of how the later stages of this case proceed, Lord Tyre's decision will provide useful guidance to any grantor seeking rectification of a deed already registered in the Land Register and to any grantee who may be looking to resist this.

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<sup>30</sup> *PHG* para 39.